Exhibit 15

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4   UNITED STATES DISTRICT COURT

5   NORTHERN DISTRICT OF CALIFORNIA

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7   COX COMMUNICATIONS, INC.,   Case No. 19-mc-80050-SK

8   Plaintiff,

9   v.   **ORDER GRANTING MOTION TO COMPEL**

10   MARKMONITOR, INC.,

11   Defendant.   Regarding Docket Nos. 1, 12, 13

I.   Background

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13   Plaintiff Cox Communications, Inc. ("Plaintiff") filed this action to compel compliance

14   with a third-party subpoena *duces tecum* that it served on Defendant MarkMonitor, Inc.

15   ("Defendant") on January 9, 2019. (Dkt. 1.) The subpoena seeks information relevant to a

16   copyright infringement lawsuit currently pending against Plaintiff in the Eastern District of

17   Virginia, *Sony Music Entm't, et al. v. Cox Commc'ns, Inc., et al.*, Case No. 1:18-cv-00950-LO-

18   JFA. The subpoena requests both documents and access to Defendants' proprietary software

19   system, information regarding versions of that system, and associated source code. (*Id.*) As to the

20   document requests, the parties do not dispute that the documents should be produced; they merely

21   disagree as to whether a deadline for production is in place. (Dkt. 1 at 10; Dkt. 12 at 2.)

22   In addition, the parties disagree about production of Defendant's software and source code.

23   Defendant argues that the requested access is unduly burdensome, as it exposes proprietary

24   information to the risk of disclosure and requires the difficult task of describing the versions of the

25   system in place at the time of the events at issue. (Dkt. 12 at 7-9.) Defendant likewise contends

26   that the information sought is available through alternative sources. (*Id.*) Plaintiff disagrees and

27   argues that the burden of providing access to the system and associated version information and

28   code is justified because the reliability and accuracy of Defendant's system in generating notices

United States District Court
Northern District of California

1   of copyright infringement is critical to its defenses in the Eastern District of Virginia action. (Dkt.

2   1 at 6.) Plaintiff also offers to send its inspecting expert to San Francisco to review the system in a

3   secured environment. (Dkt. 1 at 10.) A protective order that specifically protects source code as

4   highly confidential is in place in the Eastern District of Virginia action, and Plaintiff's expert has

5   signed that order. (Dkt. 1 at 11.) Plaintiff urges haste in the resolution of this matter, as opening

6   reports by experts are due in the Eastern District of Virginia action on April 10, 2019. (Dkt. 1 at

7   10.) The parties dispute whether Defendant's failure to raise timely objections to the subpoena

8   results in waiver of Defendant's objections or should be forgiven as a result of counsel's excusable

9   neglect in reading the wrong version of the applicable rule. (Dkt. 1 at 14-16; Dkt. 12 at 6-7.)

10   **II.   Excusable Neglect**

11   a.   Standard

12   Ordinarily, "failure to object to discovery requests within the time required constitutes a

13   waiver of any objection," a rule that applies equally to nonparties. *Richmark Corp. v. Timber*

14   *Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992); *Schoonmaker v. City of Eureka*, No. 17-

15   CV-06749-VC (RMI), 2018 WL 5829851 (N.D. Cal. Nov. 7, 2018). However, courts will

16   entertain untimely objections for good cause, including in instances where "the subpoenaed

17   witness is a non-party acting in good faith." *McCoy v. Southwest Airlines Co., Inc.*, 211 F.R.D.

18   381, 385 (C.D. Cal. 2002). In considering whether good cause exists, courts balance "factors such

19   as the length of the delay, the reason for the delay, bad faith, prejudice to the propounding party,

20   the appropriateness of the requests, and whether waiver would result in an excessively harsh

21   result." *Landon v. Ernst & Young LLP*, No. C08-02853 JF (HRL), 2009 WL 4723708, at *1 (N.D.

22   Cal. Dec. 2, 2009) (citation omitted).

23   b.   Analysis

24   There is good cause to excuse Defendant's tardiness and consider the merits of its

25   discovery objection. As Defendant admits, it served its objections to the subpoena three days late.

26   (Dkt. 12 at 5.) Defendant explains that its tardiness resulted from mis-calendaring a deadline in

27   reliance on an older version of the applicable rule. (Dkt. 12 at 5.) This appears to the Court to be

28   an innocent, if neglectful, mistake. And the Court notes that Defendant is a nonparty to the main

       litigation. Defendant did serve objections within a short time after they were due, and Plaintiff

United States District Court
Northern District of California

2

1   does not appear to be prejudiced by that short delay. Because of these facts, and because

2   Defendant, a third party in the underlying litigation, raises a serious question about whether its

3   source code should be subject to production, the Court does find good cause to excuse

4   Defendant's untimeliness. Defendant's objections are not waived, and the Court considers them

5   on the merits below.

III.   Motion to Compel

a.   Standard

Federal Rule of Civil Procedure 45 authorizes the issuance of subpoenas to nonparties

requiring testimony; the production of documents, electronic information, or tangible things within

the party's control; or inspection of premises. F.R.C.P. 45(a)(i(A)(iii). Through this mechanism,

parties may obtain access to any nonprivileged matter relevant to any party's claim or defense,

unless (a) the discovery sought is unreasonably cumulative or duplicative or can be obtained from

a source that is more convenient, less burdensome or less expensive, (b) the party seeking

discovery has had ample opportunity to obtain the information through discovery; or (c) the

burden or expense of the discovery sought outweighs its likely benefit, considering the needs of

the case, the amount in controversy, the parties' resources, the importance of the issues at stake,

and the importance of the discovery in resolving those issues. F.R.C.P. 26.

Sensitive source code may be responsive to a subpoena, and courts have compelled its

production. *See, e.g.*, *Negotiated Data Sols. LLC v. Dell, Inc.*, No. C09-80012MISC JF (HR, 2009

WL 733876, at *3 (N.D. Cal. Mar. 17, 2009); *In re Facebook PPC Advert. Litig.*, No. C09-03043

JF HRL, 2011 WL 1324516, at *4 (N.D. Cal. Apr. 6, 2011). Where there is an appropriate

protective order in place, "[r]eluctance to produce sensitive information" does not justify denial of

discovery. *Negotiated Data*, 2009 WL 733876 at *3. And when the party seeking production has

shown that the information requested is relevant and necessary, discovery is "virtually always

ordered." *Trevino v. ACB Am., Inc.*, 232 F.R.D. 612, 617 (N.D. Cal. 2006).

b.   Analysis

Plaintiff has established that the information sought in its subpoena, including Defendant's

system versions, revision history, and source code, is relevant and necessary to the underlying

litigation. In the underlying action in the Eastern District of Virginia, a group of plaintiffs, most

United States District Court
Northern District of California

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1   prominently entertainment company Sony ("Sony"), is suing Plaintiff for vicarious and

2   contributory copyright infringement, alleging that Plaintiff's internet subscribers, using Plaintiff's

3   internet services, illegally accessed copyrighted works. (Dkt. 1 at 6.) Sony seeks over $1.6 billion

4   dollars in damages. (*Id.*) Sony employs Defendant to monitor and give notice of alleged

5   infringement of its marks. (*Id.*) In establishing its claims for contributory infringement, Sony will

6   rely on Defendant's software and the data and notices it produced. (*Id.*) To posit its defense,

7   Plaintiff argues it is necessary to have access to Defendant's software and source code, because

8   the reliability and accuracy of the technology rests at the heart of the Sony's claims. (*Id.*) This

9   Court finds that the claims at issue in the Eastern District of Virginia action clearly hinge, at least

10   in part, on whether the evidence of copyright infringement that Defendant provided to Sony was

11   accurate and reliable. Plaintiff has amply made its case that access to such relevant, indeed

12   crucial, information is necessary to its defenses.

13   Defendant's contention that the information sought is available through other sources is

14   unavailing. Defendant offers unrelated reports it commissioned regarding "system flaws" as a

15   substitute for expert system and source code inspection. (Dkt. 10, Bahun Dec. at 4.) These

16   reports are in no way an adequate substitute for examination of the relevant materials by Plaintiff's

17   own expert as part of the trial proceeding. Analogously, Defendant's blank assertions that its

18   system is reliable are in no way an adequate substitute for such examination. (*Id.* at 5-6.)

19   Defendant's assertions of undue burden similarly fall flat. Allowing inspection by an

20   expert in a secure environment does not pose an undue burden to Defendant. Likewise, requiring

21   the production of revision information does not seem especially onerous given the amount at stake

22   in the Eastern District of Virginia action and the fact that Defendant is in the technology business.

23   The Court recognizes the value of Defendant's source code as a proprietary secret;

24   however, that secret is well guarded by the protective order in place in the underlying litigation,

25   which is tailored specifically for source code, and which Plaintiff's expert has signed. Source

26   code has frequently been ordered produced in discovery where an appropriate protective order is

27   in place, as one is here. Accordingly, the Court GRANTS Plaintiff's motion to compel.

28   **IV.   Conclusion**

            For the reasons stated above, the Court hereby ORDERS Defendant to comply with the

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1   subpoena *duces tecum*. Defendant shall complete production of the relevant responsive

2   documents and materials by March 25, 2019, and Defendant shall comply fully with subpoena

3   Requests 12 and 13 by allowing Plaintiff's expert to inspect each version of its system in use

4   during the claim period, all documents regarding the revision history, and associated source code

5   by March 25, 2019.

6   **IT IS SO ORDERED**.

7   Dated: March 7, 2019

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    SALLIE KIM
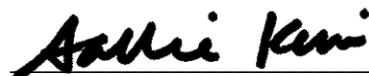
9   United States Magistrate Judge

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United States District Court
Northern District of California

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